BEFORE THE
PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **WILLIAM JENSEN** **125 Santa Paula** **Oxnard, CA 93035** **Physical Therapist License No. AT 5866,** **Respondent.**	**Case No. 1D 2001 62727** **OAH No. L2001090094**

PROPOSED DECISION

This matter came on regularly for hearing on June 25, 2002, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Complainant, Steven K. Hartzell ("Complainant"), was represented by Rajpal S. Dhillon, Deputy Attorney General.

Respondent, William Jensen ("Respondent") was present and represented himself.

At the hearing, Complainant amended the Accusation to replace the term "Physical Therapist License," wherever and each time it occurs, with the term "Physical Therapist Assistant License."

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision.

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FACTUAL FINIDINGS

The Administrative Law Judge makes the following Factual Findings:

1. Steven K. Hartzell made the Accusation in his official capacity as the Executive Officer of the Physical Therapy Board, Department of Consumer Affairs, State of California ("the Board").

2. On May 2, 1997, the Board issued Physical Therapist Assistant License No. AT 5866 to Respondent. The license was in full force and effect at all relevant times. It will expire on December 31, 2003.

3. On July 13, 1998, in Morgan County Court, State of Colorado, in Case No. 1998 T 000356, Respondent was convicted, on his plea of guilty, of violating Colorado State Statute No. 42-4-1301(1)(b) (Driving While Ability Impaired). That crime was not substantially related to the qualifications, functions or duties of a physical therapist assistant.

4. Respondent was placed on supervised probation for a period of two years under various terms and conditions including 30 days incarceration, payment of fines and fees totaling $541.00, and 24 hours of community service. He was also required to complete an alcohol program.

5. The facts and circumstances underlying the conviction are that, following the termination of a romantic relationship, Respondent became intoxicated while drinking in a tavern with friends. He left the tavern and attempted to drive home.

6. On August 4, 2000, in a court not disclosed by the evidence, in Case No. 00S002410, Respondent was convicted, on his plea of guilty, of violating Vehicle Code section 23152(a) (Driving Under the Influence of Alcohol and/or Drugs). That crime was not substantially related to the qualifications, functions or duties of a physical therapist assistant.

7. Respondent was placed on supervised probation for a period of 36 months under various terms and conditions including a 48-hour incarceration, attendance at a Drinking Driver Program, payment of fines and fees totaling $1961.00. His driver's license privileges were restricted for a period of 90 days, limiting Respondent to driving only to and from his place of employment and the alcohol school.

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8. The facts and circumstances underlying the conviction are that, on the night of July 4, 2000, horse-mounted police observed Respondent driving northbound in a southbound lane with his headlights off. They shouted at Respondent to stop. Respondent accelerated in an attempt to avoid the traffic stop.[1] The officers chased Respondent and eventually stopped him. When they looked into the vehicle, Respondent was attempting to change places with his girlfriend who had been a passenger in the front right seat. At that time, Respondent took an "Intoxilyzer" breath test which revealed blood alcohol levels of .14, .15 and .13. Several open beer cans and areas of spilled beer were found inside Respondent's vehicle.

9. On December 31, 2001, Respondent was arrested for driving under the influence and was subsequently convicted of that crime.[2] At the time of the incident, his blood alcohol level was .13 or .14. He received a fine and was required to attend alcohol school. A monitoring device was placed on his truck that required him to blow into it before the truck could be started.

10. At the time of the arrest that resulted in the above conviction, Respondent was renting a one-room cabin in the Los Padres National Forest in Ventura County. He had been clearing brush and cutting wood during the day and, in the course of performing those tasks, he had consumed beer. That night, he decided to drive approximately four miles to buy a pizza. Police stopped him on his return trip back to the cabin.

11. At the hearing, Respondent minimized the risks of his actions with respect to the incidents in 1998 and December of 2001, by emphasizing that no cars were on the road at the time he was driving while under the influence. He did not address the fact that the presence or absence of other vehicles or pedestrians in the areas through which he drove was fortuitous and was not under his control. He also admitted that he encountered two or three other cars on the way to buy the pizza in 2001. The road on which he was driving had only one lane in each direction.

12. Respondent maintains and active lifestyle and enjoys staying in good physical condition. Although he has suffered three driving while under the influence convictions in approximately four years, his work and his other activities do not involve alcohol.

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[1] Respondent denies running from the police and claims he parallel parked his pick up truck and the boat he was towing as soon as the police told him to stop. Given Respondent's blood alcohol level at the time of the stop, the police had no motive to lie about the pursuit, and Respondent does not dispute the other facts in the police report. In light of those facts, the version of the police with respect to the traffic stop is deemed the more credible.

[2] That conviction was not a charging allegation in the Accusation. It is considered as a factor in aggravation. All evidence concerning the crime and the conviction came from Respondent's testimony based on his memory of the events in question.

13. Since his first conviction in 1998, Respondent has attended approximately 12 Alcoholics Anonymous ("AA") meetings, but has not maintained any continuity with respect to its program. He could not offer any explanation for his starting and stopping his attendance at the AA meetings. Nonetheless, Respondent vehemently denies having an alcohol-related problem. He simply believes he has exercised "poor judgment" in choosing to drive while under the influence of alcohol. He claims he is not presently drinking but failed to state whether his abstention from alcohol is due to a volitional choice to improve his life or to a necessity to comply with a court order and to enable him to start his truck. Significantly, Respondent did not testify that he intends to abstain from alcohol in the future.

14. Pursuant to Business and Professions Code section 2661.5, Complainant's counsel requested that Respondent be ordered to pay to the Board $3791.50 for its costs of investigation and prosecution of the case. Although Complainant did not prevail on each cause for discipline, the same work was necessary to investigate and prosecute each cause for discipline. Accordingly, the costs are deemed just and reasonable.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause does not exist to revoke or suspend Respondent's license, pursuant to Business and Professions Code section 2660 (d), for conviction of a crime substantially related to the qualifications, functions and duties of a physical therapist assistant, as set forth in Findings 3, 4, 5, 6, 7 and 8.

Respondent's convictions in 1998 and 2000 were pled as separate causes for discipline [the first and second causes for discipline] under the same statute [Business and Professions Code section 2660(d)]. Complainant bore the burden of proving that a single cause for discipline for conviction of a driving under the influence crime is substantially related to the qualifications, functions or duties of a physical therapist assistant. He failed to do so.

Respondent pointed out that the incidents leading to his convictions were not related to his employment. It was not unnecessary for those incidents to have occurred in the course and scope of his employment in order for them to be substantially related. However, a substantial relationship between either the qualifications, functions or duties of the licensed activity must be established before discipline may be imposed on the license.

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The Board's criteria for substantial relationship are set forth at Title 16, California Code of Regulations, section 1399.20. That regulation states:

> "For the purposes of denial, suspension or revocation of a license or approval, pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a license or approval under the Physical Therapy Practice Act if to a substantial degree it evidences present or potential unfitness of a person to perform the functions authorized by the license or approval in a manner consistent with the public health, safety or welfare. Such crimes or acts shall include but not be limited to the following:
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> (a) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of the Physical Therapy Practice Act.
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> (b) Conviction of a crime involving fiscal dishonesty arising out of or in connection with the practice of physical therapy.
>
> (c) Violating or attempting to violate any provision or term of the Medical Practice Act."

Complainant failed to show that the criteria for substantial relationship have been met with respect to each single driving under the influence conviction. A substantial relationship cannot be inferred by virtue of Respondent's membership in an allied health profession. Although it could be argued that a physician, by virtue of his/her education, training and experience, knows the effect of alcohol, particularly substantial amounts of alcohol, on the body and the psyche, no such argument can plausibly be maintained with respect to a physical therapy assistant, whose professional education and training are far less extensive than that of a physician.

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2. Cause exists to revoke or suspend Respondent's license, pursuant to Business and Professions Code sections 2239 and 2660 (i), for use of alcohol by a licensee which is dangerous to the public, as set forth in Findings 3, 4, 5, 6, 7, 8, 9, 10, 11 and 13.

Unlike the single convictions, the Legislature has deemed that more than one misdemeanor involving the use, consumption, or self-administration of alcohol is logically connected and substantially related to fitness to practice. (Griffiths v. Superior Court (2002) 96 Cal.App.4th 757, 770, 117 Cal.Rptr.2d 445.) Griffiths involved a physician and was brought under Business and Professions Code section 2239. That statute and the court's rationale are applicable to physical therapist assistants. The court stated:

> "Driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society. . . . Knowledge of such repeated conduct by a physician, and particularly of its propensity to endanger members of the public, tends to undermine public confidence in and respect for the medical profession. (See *In re Lasansky (2001) 25 Cal.4th 11, 14-16* [attorney may be disbarred for criminal acts involving moral turpitude committed in a nonprofessional setting (i.e., not against clients or in the practice of law) when necessary to protect the public, promote confidence in the legal system, and maintain high professional standards.] Repeated convictions involving alcohol use, two of which violated Griffiths's (sic) probation, reflect poorly on Griffiths's (sic) common sense and professional judgment, which are essential to the practice of medicine, and tend to undermine public confidence in and respect for the medical profession. . . .
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> "In relation to multiple convictions involving driving and alcohol consumption, we reject the argument that a physician can seal off or compartmentalize personal conduct so it does not affect the physician's professional practice. (Citation.)
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> "For a nexus to exist between the misconduct and the fitness or competence to practice medicine, it is not necessary for the misconduct forming the basis for discipline to have occurred in the actual practice of medicine. '[The Medical Board] is authorized to discipline physicians who have been convicted of criminal offenses not related to the quality of health care.' (Citation.)"

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In addition to providing for professional discipline on the basis of two or more alcohol-related misdemeanors, Business and Professions Code section 2239(a) also provides for imposition of professional discipline on the basis of "the use . . . or administering to himself or herself, of . . . alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public . . ." The evidence did not disclose Respondent's blood alcohol level at the time of his arrest in 1998. It was between.13 and .15 at the time of his arrests in 2000 and 2001. There can be no question that driving a vehicle with such a blood alcohol level presented a danger to himself and to the public, such that the criteria set forth in Business and Professions Code section 2239(a) are satisfied.

3. Cause does not exist to revoke or suspend Respondent's license, pursuant to Business and Professions Code section 2660 (f), for habitual intemperance, as set forth in Findings 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13.

Complainant failed to prove that Respondent is habitually intemperate. In In re Sherman M. (1974) 39 Cal.App.3d 40, 113 Cal.Rptr. 847, the court stated:

> "The term 'habit' and 'habitual' have been defined in the cases, encyclopedias and law dictionaries. The definitions are understandable, definite and very much the same. They are simple words with simple meanings (Citation.) See, e.g., 39 Corpus Juris Secundum pages 756-757: '*Habit:* A word with a clear and well understood meaning; … *Intemperate habit or Intemperate habits.* Plain nontechnical words, meaning any habit pursued to excess; and with particular reference to intoxicants it is the use thereof, commonly, to excess; any immoderate or excessive use of intoxicating liquors.' (Citation.)
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> "In *Mahone v. Mahone, supra, 19 Cal. 626*, the California Supreme Court in 1862 found no difficulty in defining 'habitual intemperance' as grounds for divorce as follows: 'If there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance—although the person may at intervals be in a condition to attend to his business affairs' (P. 628.) This definition retains validity for purposes of civil obligation . . ."
> (Id. at 44.)

Administrative disciplinary proceedings are civil, rather than criminal in nature. (Small v. Smith (1971) 16 Cal.App.3d 450, 457.) Therefore, the above definition of "habitual intemperance" is applicable to this case.

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Complainant failed to establish that Respondent becomes intoxicated at such frequency or to such degree that he is disqualified "from attending to his business during the principal portion of the time usually devoted to business." On the contrary, the uncontroverted evidence was that Respondent engages in his business, and well as a number of other activities, free from the use of alcohol. Accordingly, the cause for discipline of Habitual Intemperance must fail.

4. Cause exists to order Respondent to pay the costs claimed under Business and Professions Code section 2661.5, as set forth in Finding 14.

Nature and Degree of Discipline to be Imposed

The Board has established criteria for rehabilitation to be used in determining the appropriate discipline to be imposed on a licensee. The criteria are set forth at Title 16, California Code of Regulations, section 1399.22, as follows:

> "When considering the suspension or revocation of a license or approval on the ground that a person holding a license or approval under the Physical Therapy Practice Act has been convicted of a crime, the board in evaluating the rehabilitation of such person and his or her eligibility for a license or approval shall consider the following criteria:
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> (a) The nature and severity of the act(s) or offense(s).
>
> (b) The total criminal record.
>
> (c) The time that has elapsed since commission of the act(s) or offense(s).
>
> (d) Whether the licensee, certificate, approval, or permit holder has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.
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> (e) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.
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> (f) Evidence, if any, of rehabilitation submitted by the license, certificate, approval, or permit holder."

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Although Respondent's crimes were misdemeanors, he suffered three driving under the influence convictions in a four-year period, at least two of which involved significantly high blood alcohol levels. Those facts, coupled with the substantial danger at which Respondent placed the public by his conduct, require that the crimes be considered quite serious. The fact that the conviction most remote in time is only approximately four-years-old, with the other two occurring in 2000 and 2002, respectively, evince the recency of the convictions. Respondent offered no evidence to show that any of his convictions have been expunged.

Respondent offered virtually no evidence of rehabilitation. He has attended approximately 12 AA meetings but demonstrated no commitment to the program or to rehabilitation in general. His outright denial of an alcohol-related problem in the face of three recent driving under the influence convictions evinces at least the strong possibility of bibulousness. That denial of an alcohol-related problem demonstrates not only a lack of rehabilitation, but serves as a factor in aggravation as well. In light of the above, the public health, safety, welfare and interest cannot be adequately protected except by the revocation of Respondent's physical therapist assistant license.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. License No. AT 5866 issued to Respondent, William Jensen, is revoked.

2. Respondent is hereby ordered to reimburse the Board the amount of $3791.50 for its investigative and prosecution costs. Payment in full shall be made within 30 days from the effective date of this decision unless the Board agrees in writing to payment by an installment plan.

DATED: July 1, 2002

Original signed by H. Stuart Waxman
H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against WILLIAM JENSEN 125 Santa Paula Oxnard, CA 93035	))))))))	Case #: 1D 2001 62727

The foregoing Proposed Decision, in case number 1D 2001 62727, is hereby adopted by the Physical Therapy Board, Department of Consumer Affairs, State of California.

This decision shall become effective on the 31st day of August, 2002.

It is so ordered this August 1, 2002 .

Original Signed By
Ellen Wilson, P.T., President
Physical Therapy Board
of California